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No. 545

Supreme Court of the United States

October Term, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

Statement

Plaintiffs have appealed from the order of the Court of Appeals of the State of New York holding in all respects valid and constitutional the provisions of the Alcoholic Beverage Control Law of the State of New York challenged by the plaintiffs in this action. The order affirmed the unanimous affirmance of the Appellate Division, Third Judicial Department of the State of New York, which had affirmed the judgment of the Supreme Court of the State of New York which had denied plaintiffs' motion for preliminary injunction and granted defendants' motion for declaratory judgment declaring the statutory provisions constitutional and valid.

This Court noted probable jurisdiction on November 22, 1965 (15 L. ed. 2d 338).

The statutory provisions challenged have not yet been put into effect[1] because plaintiffs obtained a stay on October 29, 1964, the eve of the effective date of the sections (October 31, 1964). The stay was in effect by its terms until the date of the order and judgment of the Court of first instance (April 19, 1965). Thereafter, in lieu of plaintiffs' inevitable application for further stays, the State Liquor Authority refrained from putting the provisions into effect while the appeals were pending first in the Appellate Division (which issued its order of affirmance on May 14, 1965) and then in the Court of Appeals (where the appeal was argued on May 27, 1965). After the Court of Appeals decision on July 9, 1965, Chief Judge DESMOND granted plaintiffs application for a stay pending their application therefor to Mr. Justice HARLAN. Mr. Justice HARLAN granted the stay on August 5, 1965. This stay is now in effect.

The Action

This action was brought by 62 distillers, wholesalers and importers of alcoholic beverages for a judgment declaring invalid two sections of a 1964 general amendment of the New York Alcoholic Beverage Control Law (Chapter 531, 1964 Laws of New York)[2]. The challenged sections of

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[1] Therefore, (*infra*, pp. 49 *et seq.*) all of appellants' arguments as to the effect of the provisions on their business operations are necessarily conjectural and speculative (in addition to having no bearing on the constitutionality of the provisions).

[2] The New York Alcoholic Beverage Control Law (hereinafter sometimes cited as the "ABC Law") regulates the manufacture, sale and distribution of alcoholic beverages within the State of New York. Those who would traffic in alcoholic beverages within the State are required to be licensed by the State.

Chapter 531 are Section 9 and certain provisions of Section 7. Both of these sections amended Section 101-b of the ABC Law which, as its title indicates, covers the subject of "Unlawful Discriminations" in pricing and the "filing of schedules" of prices to wholesalers and retailers with the State Liquor Authority. The text of Sections 7 and 9 of Chapter 531 is set forth in Appendix B hereto.

The concentration of plaintiffs' attack has throughout the litigation been upon Section 9.

The statutory provisions which are the subject of the action will be more fully discussed *infra* under the subheading "The 1964 Liquor Law". In this introductory portion of this brief we note the essence of the provisions, *viz.:*

Section 9 provides that as part of the monthly schedules of brand owners', distillers' or manufacturers' prices to wholesalers, and of wholesalers' prices to retailers, which schedules, since 1942, are required by Section 101-b of the New York ABC Law to be filed for the ensuing month with the State Liquor Authority, there must also be filed an affirmation verified by the brand owner or his designee that the brand price in the schedules is no higher than the lowest price at which the same item of liquor was sold by the brand owner or his designee, or by any related person,[3] to any wholesaler or retailer in any other State of the United States at any time in the month immediately preceding.

The provisions of Section 7 of Chapter 531, amending Section 101-b, subdivision 3(a) of the ABC Law, which the appellants attack are the following: The provision that price schedules must contain "the net bottle and case

[3] "Related person" is defined in Section 9 in paragraphs (d) and (f).

price paid by the seller." Necessarily this means the bottle and case price when the seller has *paid* a bottle and case price. The other is that which provides that the prohibition against sale to or purchase by a wholesaler, unless price schedules are filed, applies "irrespective of place of sale or delivery". Necessarily this affects only wholesalers licensed to sell in New York (Alcoholic Beverage Control Law Section 105[16], sale to or purchase by wholesalers for resale in New York, and the monthly schedules of prices in New York, required to be filed by New York licensees. State Liquor Authority Rule 16, Part 65 § 65.6 [b] [3], § 65.1 [a] [1]). The words "irrespective of place of sale or delivery" were added to eliminate any contentions that sale is not in New York when a New York wholesaler takes delivery at out-of-state distilleries (see *infra*, p. 9).

Question Presented

In appellants' "Questions Presented" (Br., pp. 3-4) they have incorporated their contentions of the effect of the statutory provision they attack upon their business operations and they have incorporated their arguments as if these were the undisputed and indisputable facts on which their challenge of constitutionality of the statutes is to be answered.

These are not the "Questions". They are the very things this Court would have to accept and decide to be proper bases upon which the constitutionality of statutes are determined. The State Courts did not accept them.

The Question Presented on this appeal, in this Court, is single. It is this:

May the State constitutionally provide by statute that, in respect to the monthly schedules of brand prices of

liquor required to be filed by brand owners and wholesalers of liquor (who must be licensed by the State in order to sell their products in the State and are regulated by the State), there must also be filed a verified affirmation by the brand owner that such brand prices in New York State to wholesalers and to retailers are no higher than the lowest prices at which such brands were sold in the preceding month in the United States outside New York State to wholesalers and to retailers by the brand owner, or by any person who has the status of a related person—as defined in the statute—to the brand owner, and that wholesalers who themselves sell elsewhere in the United States outside the State of New York make similar affirmation as to their own prices to retailers?

Opinions of the Courts of the State of New York

The opinions of the New York Court of Appeals (July 9, 1965) are reported in 16 N. Y. 2d 47, 209 N. E. 2d 85, 262 N. Y. S. 2d 453.

The opinion of the New York Appellate Division, Third Department (May 13, 1965), is reported in 23 N. Y. A. D. 2d 933, 259 N. Y. S. 2d 644.

The opinion of the New York Supreme Court, Albany County (April 8, 1965), is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442.

The essentials in the opinions of the New York State Courts are set forth here:

Court of Appeals Opinion

1. **Price Discrimination**—"It [the Moreland Commission] found in effect gross price discrimination against the New York consumer by the industry". (16 N. Y. 2d p. 54).

2. **Legislative Purpose in 1964 Amendment of ABC Law**—"[I]ts [the Commission's] studies showed no correlation between consumption and prices, looking at the experience in States in which prices were high compared with those in which they were low". "The result was the enactment of a statute by the Legislature * * * which, among other things vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices". "[T]he Legislature by Section 9 * * * set up means which sought to keep down the prices of brand liquors to the consumer". (16 N. Y. 2d at pp. 54, 55).

"Thus it was sought to end the discrimination by the liquor industry against the New York consumer." (16 N. Y. 2d at p. 55).

3. **Twenty-first Amendment; State Police Power**—"It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution"[4] (16 N. Y. 2d at p. 57). "[T]he Twenty-first amendment spells out * * * specific and federally protected right of each State to eliminate as well as regulate the liquor traffic within its borders".[5] (16 N. Y. 2d at p. 56).

On the States' power "in matters affecting the welware of a State and its people, liquor aside," the Court cited *Hoopeston Co.* v. *Cullen*, 318 U. S. 313; *Huron Cement Co.* v. *Detroit*, 362 U. S. 440; *Osborn* v. *Ozlin*, 310 U. S. 53, (16 N. Y. 2d at p. 59).

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[4] Discussing (16 N. Y. 2d at pp. 57-58) *State Board* v. *Young's Market*, 299 U. S. 59; *Mahoney* v. *Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132. The opinion distinguished (p. 58) *United States* v. *Frankfort Distilleries*, 324 U. S. 293; *Hostetter* v. *Idlewild Liq. Corp.*, 377 U. S. 324; *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341.

[5] Citing *Mahoney* v. *Triner Corp.*, 304 U. S. 401.

4. **Regulation of Liquor Industry**—"A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics or furniture." (16 N. Y. 2d at p. 56).

5. **Due Process**—"If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers." "In light of * * * [the] national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than 'the lowest price elsewhere' seems greatly overstressed." (16 N. Y. 2d pp. 56, 57).

6. **Monopoly States Pricing Compared.**—Testimony of Moreland Commissioner Walsh is quoted citing "Pennsylvania, a monopoly State, 'the largest purchaser of liquor in the world * * * $400,000,000 worth of liquor a year—one customer' " * * * "an example of a customer who insists 'on the lowest price that the distiller offers anywhere in the country.' "

* * *

"The requirement of section 9 is not, indeed, unusual in concept and those States which have State liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no higher than the price charged in other States. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable." (16 N. Y. 2d at p. 57).

7. **Interstate Commerce**—"In effect the dependence of the New York price on the maximum price of the

distiller for his brand elsewhere is to tie the price in this State into a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

"That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity."

"The incidental effect of this on prices in another State does not invalidate the New York statute." (16 N. Y. 2d at pp. 56, 57).

8. **Anti-Trust; Robinson-Patman Act**—"The provisions of section 9 are not transformed into an 'anti-trust measure' in conflict with the supremacy cause on the basis of plaintiffs' conception that the statute is not 'a device to promote temperance'; nor are they for similar reasons in conflict with the Robinson-Patman Act. * * * It is a strained argument to make, as plaintiffs do, that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act." (16 N. Y. 2d at p. 59).

The opinion concluded as to plaintiffs' argument that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost, with this comment: "As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry." (16 N. Y. 2d, at pp. 59, 60).

To plaintiffs' attack upon portions of § 7, the Court's response was (16 N. Y. 2d, p. 59):

> "The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor."

This construction of a New York statute by the State's highest court, this Court will accept as "binding" upon it. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432 (1963). As Mr. Justice BRENNAN said in that case:

> "For us the words of Virginia's highest court are the words of the statute * * * 'we are not left to speculate at large upon the possible implications of bare statutory language.' "

The basis of the dissenting opinion was that the statute was not justified as a police power exercise. (16 N. Y. 2d, at p. 60).

Appellate Division Opinion

1. **Price Discrimination; Legislative Policy in 1964 Amendment of ABC Law.—**

> "The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to *eliminate discrimination against New York consumers* and 'to forestall possible monopolistic and anti-competitive practices *designed to frustrate the elimination of such discrimination', price discrimination* and favoritism *being found 'contrary to the best interests and welfare of the people of this state'.*" (23 N. Y. A. D. 2d, at p. 934; Italics ours)

2. **Police Power**—"[T]he enactment constitutes a valid exercise of the police power." (23 N. Y. 2d at p. 934).

3. **Robinson-Patman Act; Sherman Act; Supremacy Clause; Commerce Clause**—"Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act * * * and the Sherman Act * * * and thus are violative of the supremacy clause and that the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation, in which, under the Federal Constitution, effective control may be exercised by the States" (23 N. Y. A. D. 2d at p. 934, citing the Twenty-first Amendment and the classic decisions of this Court under the Amendment, and distinguishing *Frankfort Distillers,* the *Idlewild* case and *Department of Revenue* v. *Beam*).

4. **Due Process**—"[T]he enactment * * * effects no deprivation of due process." (23 N. Y. A. D. 2d, at p. 934).

5. **Equal Protection**—"Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied." (23 N. Y. A. D. 2d, at p. 934).

6. **Other Contentions**—"Appellants' remaining contentions seem to us unsubstantial and do not require discussion." (23 N. Y. A. D. 2d at p. 934).

State Supreme Court Opinion

Justice STALEY's opinion in the Court of first instance weighed *seriatim* the allegations of the complaint and all of plaintiffs' arguments and passed upon all of them. On each of the arguments raised by plaintiffs he held to the same effect as did, subsequently, the Appellate Division and the Court of Appeals:

1. **Due Process—**

"Courts no longer employ the due process clause of the Constitution to invalidate State laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson* v. *Lee Optical Co.*, 348 U. S. 483. * * *).

"Nor will the court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light* v. *Missouri*, 342 U. S. 421 * * *).

"Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Auto. Assn.* v. *Maloney*, 341 U. S. 105; *Breard* v. *Alexandria*, 341 U. S. 622; *Day-Brite Light* v. *Missouri, supra;* * * *).

"Plaintiffs' attack on chapter 531 on the basis that it deprives them of liberty and property without due process of law * * *, allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other States. These allegations, even if proven, have no bearing on the constitutionality of the statute. (*California Auto. Assn.* v. *Maloney, supra; Breard* v. *Alexandria, supra; Day-Brite Light* v. *Missouri, supra;* * * *.)" (45 N. Y. Misc. 2d, at pp. 961, 962).

2. **Police Power**—"Being an enactment under the police power of the State, the strongest presumption of validity attaches to chaper 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the State's police power. "The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. 'Legis-

lation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate.' (*People* v. *Griswold,* 213 N. Y. 92, 97.)" (45 N. Y. Misc. 2d at p. 962).

3. **Price Discrimination; Difficulty of Compliance**—"The provisions of chapter 531 requiring filing price schedules and affirmations are not, in and of themselves, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differentials allowed, does not make the act arbitrary, capricious and unreasonable." (45 N. Y. Misc. 2d, at p. 963).

4. **Equal Protection**—" 'The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' (*Tigner* v. *Texas,* 310 U. S. 141, 147.) The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional." (45 N. Y. Misc. 2d, at pp. 964, 965).

5. **Twenty-First Amendment**—"There is no doubt that under the Twenty-first Amendment of the Constitution of the United States that the State of New York may * * * regulate, * * * and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the State. (*California* v. *Washington,* 358 U. S. 64; *Department of Revenue* v. *Beam Dis-*

tilling Co., 377 U. S. 341; *Hostetter* v. *Idlewild Liq. Corp.*, 377 U. S. 324.)" (45 N. Y. Misc. 2d, at p. 964).

6. **Interstate Commerce**—"The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. * * * Any effect which it has on interstate commerce is entirely coincidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates Nationwide does not invalidate the State action, particularly where the subject of the action is within the police power of the State. (*Osborn* v. *Ozlin*, 310 U. S. 53; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761; *Watson* v. *Employers Liab. Corp.*, 348 U. S. 66.)" (45 N. Y. Misc. 2d, at p. 964).

7. **Sherman Act; Robinson-Patman Act**—"The commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act." (45 N. Y. Misc. 2d, at p. 964).

The Genesis of the 1964 Liquor Law

In 1963 Governor Rockefeller appointed a Moreland Commission to undertake a "thorough study and reappraisal of the [New York Alcoholic Beverage Control] Law with respect to the sale and distribution of alcoholic beverages in the State, to examine and investigate * * * the methods and practices of manufacturers, distributors and

retailers of alcoholic beverages in the State" and to propose any revisions of the law which might be found necessary "in the light of experience and current social and economic conditions" (Executive Order February 15, 1963).

The Governor's announcement of appointment of the Commission and the Executive Order (February 15, 1963) noted that the Alcoholic Beverage Control Law had been enacted in 1934, "following closely" the repeal of Prohibition, and that there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

Liquor Prices and Temperance

The Commission's "basic re-examination" was not only of the Alcoholic Beverage Control Law but also of "the major assumptions on which it rests". This included an examination of experience to learn whether the statutory provisions relative to distribution promoted temperance. (Moreland Commission Report and Recommendations #1, p. 3)

It was found that "figures show a steadily increasing amount of per capita consumption in the nation and a greater than average increase in New York State" (*id.*, and see *State Monopoly and Price Fixing in Retail Liquor Distribution,* John E. Dunsford, Wisconsin Law Review [May 1962] pp. 454, 480-481, 482, 484); that the theory at the time of repeal that high prices would retard the sale and consumption of liquor was shown by 30 years' experience to have been erroneous (minimum liquor prices had been the statutory result of this theory); that all that minimum prices have accomplished has been to benefit the industry (*cf. State Monopoly and Price Fixing in Retail*

Liquor Distribution, supra, pp. 479, 484). What has been traditionally (going back to Colonial times) and was to be after Prohibition a stringently regulated industry, had become a protected industry—protected as no other private industry is protected. The Moreland Commission found (Report #3) that "the argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is * * * unfounded" (*id.*, p. 17). See *infra* Borregard & Glusker, Yale Law School (1950), *The Distilled Spirits Industry; A Marketing Survey.* "To test the thesis that high prices promote temperance" (Moreland Commission Report #3), the Moreland Commission examined the "high" and "low" price States and the per capita apparent consumption in the States and found no pattern to indicate that high prices and low consumption co-existed, or low prices and high consumption (*id.*, pp. 17-18). It found no discernible relationship between consumption patterns in "low" or "high" price States.

The Commission concluded that all that high consumer prices accomplished was to benefit the industry at the expense of the New York State consumer. The Commission recommended repeal of § 101-c of the Alcoholic Beverage Control Law, which had provided for minimum consumer resale prices fixed by brand owners and enforced by the State Liquor Authority.

The Interim Report of the Commission on August 30, 1963, after six months of study, had queried in respect to § 101-c: "The history of this * * * restriction * * * raises a question as to whether protection of the profitability of the liquor industry is a proper objective" of regulation (p. 12).

On "promotion of temperance" which plaintiffs have all through this litigation urgently contended is the sole permissible purpose of state laws regulating or restraining the liquor industry, the Moreland Commission Report observed (Report #1, p. 3):

> "the industry apparently regards as 'temperate' those increases in consumption which accompany 'accepted' merchandising methods, including extensive advertising expenditures. With equal disregard for objective standards of measurement, most of the industry claims that 'temperance' has been fostered by the existing restrictions on the distributive system, but states that it has no means of proving this by reference to any statistics" (*id.*, p. 3).

Appellants, it might be noted, continue in this action this illogical position. While decrying the requirement of § 9 as not conducive to the temperance purpose of the Alcoholic Beverage Control Law,[6] with dramatic inconsistency, the pervading thesis of their case is speculation as to the frustrating effect § 9 would have on the merchandising and pricing practices in which they indulge outside New York State to spur their sales and increase their profits (Br. pp. 28, 58). The vast sums distillers spend on brand advertising are of course for the purpose of stimulating sales (see Moreland Commission Report #3, p. 17) with no qualms as to the effect on temperance.

Wholesale Liquor Prices in New York State

As to prices in New York State, the Moreland Commission study found that "many retail prices in the District of Columbia are below the cost to New York State retail-

[6] That all sections of the Alcoholic Beverage Control Law need not promote the temperance purpose of liquor regulation and that the public interest which is generally to be promoted pursuant to the statute, and the State's police power generally, authorize the enactment of § 9 is discussed *infra* Point II.

ers" (Study Paper Number 5, p. 32 [October 28, 1963] by Harold L. Wattel). The following table is set forth in the study paper as illustrative *id.*:

TABLE 13

Retail Prices of Selected Distilled Spirits Brands, Washington, D. C., Compared With Wholesale Prices of the Same Brands, New York State, August-September, 1963

Brand	*Fifths*	
	Washington, D. C. Retail Price	*New York State Wholesale Price*
P. M. (Blend)	$2.85	$3.45
Old Crow (Straight)	3.39	4.15
Gilbey's Gin	2.87	3.17
Haig and Haig (Scotch)	4.59	5.31
Seagram's V. O. (Canadian)	4.87	5.06

Sources: *Beverage Media,* August, 1963; *Washington Post,* September 4, 1963, and field survey by author.

The final report of the Moreland Commission on Prices (Report #3, January 21, 1964) declares:

> "New York *wholesale* prices for packaged whiskey are so high that New York retailers actually pay higher purchase prices in many instances than ultimate consumers pay for the same products in other areas." (pp. 5-6. Italics in Report.)

A chart is set forth illustrating and supporting this statement, which compares wholesale prices per Fifth in New York for 18 brands with consumer prices in Washington, Miami and Chicago.

Executive and Legislative Action following the Moreland Commission Reports

Following the submission of the Moreland Commission reports on January 21, 1964, Governor Rockefeller on Feb-

ruary 10, 1964, submitted a special message to the Legislature summing up the Commission's conclusions. He noted that the Commission reported "[T]hat the liquor industry has acquired the dominant hold in a field properly regarded as one requiring public regulation; no other industry has its economic interests so uniquely favored with statutory protections; and it is contrary to the public interest to have the regulated industry in such a dominant role".

Among the Commission's goals, said the Governor's special message, had been:

> "Bringing justice to the consumer by putting to an end artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

On the subject of "Distiller-Fixed Consumer Prices", the Governor's message declared that the Commission's findings indicate that

> "* * * New York consumers have been compelled to pay on the average $1 more per fifth of liquor than they would have to pay if there were a free market. * * * The total bill for this surcharge foisted on New Yorkers now runs to $150 million a year and it is rising every year.
>
> "The present system of price control has no significant effect upon the consumption of alcoholic beverages upon temperance or upon the incidence of social problems related to alcohol."

On February 26, 1964 the "Joint Legislative Committee For Study of Alcoholic Beverage Control Law" held a public hearing at which the Moreland Commission Report was discussed.

On behalf of the package stores which opposed the elimination of the minimum consumer price provision (§ 101-C),

there was testimony that such elimination "without wholesale price reductions" would continue to compel present retail prices in order for retailers "to stay in business" (Minutes of the Hearing, p. 300). This testimony continued:

> "It is argued that eliminating price stabilization will cause the distillers to lower their prices due to competition among themselves. But it must be emphasized that price stabilization is not price control. *There is no law on the books of the State of New York right now, today, that prevents the distiller from lowering his prices. Therefore, if this free market theory* of the Moreland Commission *works so well, why then don't the distillers lower their prices right now?* Now it seems clear that it is not retail price stabilization which is at fault, but the level at which prices are being controlled, if they are at all." (Italics ours.)

No liquor legislation passed before the Legislature adjourned its regular session on March 26, 1964.

Three weeks later, Governor Rockefeller convened a Special Session of the Legislature. His Message calling the session asked for repeal of § 101-c, the minimum consumer resale price provision, and also for legislation providing that brand prices in New York State be "certified" to be "at least as low as the price charged in any other State or Washington, D. C."

It was at this Special Session that all of the 1964 amendments to the Alcoholic Beverage Control Law were adopted in one chapter (Chapter 531).

The 1964 Liquor Law

Chapter 531 of the Laws of 1964, adopted at the Special Session amended the Alcoholic Beverage Control Law on several subjects.

The 1964 amendments were designed to eliminate or change provisions of the law enacted closely upon the repeal of Prohibition, pursuant to concepts which, at the time the law was passed, were thought wise regulation of the sale of alcoholic beverages, but which on reappraisal after 30 years were found not to have accomplished the desired purpose or to have produced some evil results, or simply to have the effect of exploiting the purchaser of liquor in New York State to the benefit of the industry.

Two key provisions of the 1964 law (§§ 13-14) eliminating the pre-existing requirement (§ 105, subds. 4 and 4-a) for certain distances between location of package stores, were attacked and upheld by the Court of Appeals of New York in *Martin, et al.* v. *State Liquor Authority* (15 N. Y. 2d 707)[7] on the opinion of Mr. Justice LAWRENCE H. COOKE in Supreme Court Court [43 N. Y. Misc. 2d 682]).

Section 8 of the 1964 statute stated its purpose in respect to liquor prices:

> "8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) *that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states,* and that *the price discrimination* and favoritism *are contrary to the best interest and welfare of the people of this state,* and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. *In order to forestall possible*

[7] In that litigation the plaintiffs argued, vehemently, just as plaintiffs do here that the amendment they were attacking was not consonant with the temperance purpose of the Alcoholic Beverage Control Law but rather inimical to that purpose.

monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and *the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.*" (Italics ours.)

Section 11 of the statute repealed § 101-c of the Alcoholic Beverage Control Law which had provided for brand owner fixed minimum resale prices to be enforced by the State Liquor Authority and for violation of which the retailer was subject to suspension, cancellation or revocation of his license and money penalty (§ 101-c, subd. 7).[8]

The goal of bringing down prices was then further implemented by § 9, which amended § 101-b of the Alcoholic Beverage Control Law. The provisions of that section (subd. 3) which for 22 years have required the filing of price schedules by brand owners and wholesalers, were also amended in several details by § 7 of the statute.

Section 9

We have noted above the essence of § 9, the requirement of the filing of (a) affirmation by the *brand owner* that the filed prices of brands in this state, distiller to wholesaler, for an ensuing month be no more than in any other State or in the District of Columbia in the preceding month, and (b) affirmation by the *brand owner* that its wholesale prices to retailers or the prices of its brands to retailers

[8] Any hoped for benefit in lower consumer prices from the repeal of this provision has been frustrated by Distillers making "Fair Trade" contracts with retailers pursuant to New York State's Fair Trade Law (New York General Business Law, Art. XXIV-A; see *National Distillers and Chemical Corporation* v. *Seyopp*, N. Y. Court of Appeals, January 20, 1965).

by wholesalers in this State, which have a related person relationship to the brand owner, are no more than such prices in the preceding month in any other state or in the District of Columbia by the brand owner or a wholesaler which has a related person relationship to the brand owner.

The lowest price outside New York, which § 9 makes the standard for New York prices, is such price after discounts, rebates, free goods, allowances and other inducements to the purchasers in other States. ("i" of § 9 [§ 101-b, subd. 3-i].)

A "related person" is defined in detail in § 9 (¶¶ [d] and [f]) as one related to the brand owner in that (1) the brand owner has in the wholesaler's business direct or indirect stock ownership, standing as lendor or lienor, or there are interlocking directors or officers, (2) the exclusive, principal or substantial business of the wholesaler is the sale of the brand owner's product or products, or (3) the wholesaler holds an exclusive franchise from the brand owner. The factors defining a "related person" in item (1) of the definition are similar to those which by pre-existing § 101 (subd. 1, ¶¶ [a], [b]), § 105 (subds. 16, 17), § 106 (subds. 13, 14) constitute relationships interdicted between manufacturers or wholesalers on the one hand and retailers both for on-premises and off-premises consumption. They are thus familiar to distillers, manufacturers and wholesalers doing business in liquor in New York State. See also § 101, subdivision 1 (c).

Wholesalers who are not "related persons" are required to file affirmations only as to their own prices outside New York State, if they sell outside New York State. (§ 9, ¶ [g]. See also ¶ [e].)

Section 7, Subdivision 3 (a)

The Court of Appeals of New York has construed this provision contrary to appellants' contentions, and such construction this Court accepts as binding (*supra* p. 9; *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432). Section 7, will therefore not be additionally discussed in this brief.

Some Similar Statutory Language in the Alcoholic Beverage Control Law Prior to §9, Construed and Applied by the State Liquor Authority and the Industry for 22 Years.

In their complaint and affidavits plaintiffs pleaded that several words used in Section 9 are vague and that they would be at a loss as to how to comply with such language. As the case moved through the State courts, they abandoned their "vagueness" argument as to one word after another until in this Court, they confine that argument to the word "substantial" (Br. p. 66). We answer this last contention *infra*. Because appellants' complaint and affidavits are in the record in this Court, including their claims of vagueness of other language in Section 9, although no argument thereon is pressed, in Appendix A to this brief we note some language in pre-existing sections of the Alcoholic Beverage Control Law which is the prototype of language in § 9. With the earlier sections, the industry has found it possible to comply for 22 years with, where occasion indicated, guidance from the State Liquor Authority (Phillips' Affidavit on behalf of Defendants' R. 311-314). This rebuts completely appellants' contentions as to such language that it is vague and the appellants would not know what falls within it (*e.g.*, Br. p. 66).

In addition to setting out in Appendix A pre-existing sections using this language, we also compare pre-existing sections using language similar to item 1 of the definition of "related person".

Some of the Characteristics of the Industry to Which Section 9 Applies in Respect to Merchandising and Pricing Practices.

The Legislature was not legislating in the abstract when it enacted § 9. It was enacting a regulatory provision to apply to a particular Industry, with, it is to be presumed, an awareness of the distribution and pricing practices of the Industry.

Similarly, appellants' arguments here are not to be considered in the abstract, but in the light of the merchandising and pricing practices of the Industry.

The Industry does not publicize or announce its merchandising and pricing practices. They are, however, matter of common knowledge among those practically acquainted with the Industry. It is, as has been said, to be presumed that the New York State Legislature was aware of the situation when it enacted § 9. The Industry had been the subject, for several years, of study; of a great deal of discussion publicly, in and out of legislative precincts; and, we may be certain, with members of the Legislature. The Legislature could act on its common knowledge, on its pooled general knowledge (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-3).

The Legislature was seeking to achieve lower prices of liquor to consumers in New York, which prices had been found after study to be higher in New York than in many places outside New York. These prices had been state-protected and enforced under § 101-c of the Alcoholic Bever-

age Control Law. The Moreland Commission had found that wholesaler to retailer prices were higher in many instances in New York than retailer to consumer prices elsewhere (*supra*, pp. 17-18). It is to be presumed that the Legislature and its members learned of the operations of the Industry, as to the manner in which wholesale prices are determined, and generally as to the manner in which brand owners market their brands through wholesalers (*cf. Martin* v. *State Liquor Authority*, 15 N. Y. 2d 707 [1965], aff'g Opinion of Cooke, J., 43 N. Y. Misc. 2d 682, 685). It is to be presumed that on this knowledge the Legislature dealt as it did with distiller and wholesaler prices when it also repealed the statutory minimum consumer price provision.

In addition, the merchandising and pricing practices in the Industry can be deduced from distribution patterns and from wholesaler to retailer prices in this State and elsewhere (*infra*). Occasionally something on the subject appears in testimony in litigations. Much is revealed by statements in the very affidavits in this case. And there have been some published objective studies of the industry. The latter all attest to the hold of the manufacturer on the merchandising and pricing of their brands from the time they leave the distiller until they reach the consumer.

The known characteristics of the Industry in respect to merchandising and pricing make clear the reason for and purpose of § 9. They also demonstrate the disingenuousness of appellants' contentions (*e.g.*, Br. pp. 62-63) of problems and of the legal propriety of obtaining information for the purpose of compliance (Br. pp. 28, 45-46).

Appreciation of the merchandising and pricing practices in the industry makes clear indeed that it is not this statute which is incompatible, as appellants argue (Br., Point II),

with anti-monopoly and price anti-discrimination acts but, if anything, current industry practices.[9]

Objective studies have concluded that because of the high degree of concentration in the industry, the "areas in which the autonomous decisions of the wholesaler, retailer or small distiller are significant are correspondingly narrow, * * *. The economist would say that we are dealing with an oligopolistic[10] industry, whose product is a monopolistically differentiated one, and whose pattern of price fixing [was] legally sanctioned" (*The Distiller Spirits Industry: A Marketing Survey,* Borregard & Glusker, Yale Law School [1950] pp. 15-16).

The distilling of whiskey in the United States is in the hands of at most 88 companies (Moreland Commission Study Paper #5, p. 7), which have gross annual sales of nearly $5 billion. Four of the distillers known in the industry as the "big four" do some 60% of the business of distilling or manufacture and set its pace. These four are among the appellants in this action. Three of the affidavits on behalf of the appellants are made by vice-presidents of three of the "big four" (Lind, Revit, Hermann).

The industry is characterized by its brand consciousness. Each distiller has a number of brands (see, *e.g.,* Affidavits

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[9] In the current session of the Legislature, hearings are being conducted by a joint legislative committee (Senator Seymour R. Thaler, Chairman) in an endeavor to find the answer to the continued high prices of alcoholic beverages in New York State since the 1964 liquor law became effective. The minutes of hearings already held are not yet available. As reported in the press the pricing practices of the industry starting with the distillers and down the line as described above and *infra,* pp. 54-57, are supported and documented by testimony that is being given at these hearings.

[10] An "oligopoly" is defined by economists as an industry in which a few sellers are dominant (*id.* p. 147).

of Lind, Street, and Hermann, listing brands of Seagram, Hiram Walker and National Distillers). Each brand is in a price class—(AA Prime, AA, A Prime, A, B, C). Each distiller—certainly the big four distillers—has a brand or brands within each class. (Moreland Commission Study Paper #5, p. 11.)

The brand class of a distiller's product, the retention of its prestige, is the supervening concern of the distiller. Brands are developed with the purpose of fitting into a certain class. The class is equated with the consumer price per bottle. The selling prices from distillery through wholesaler to retailer are arrived at on a mark-up scale for the brand intended as a "prime" or other class brand.

The industry considers its competitive weapon to be not price, but brand building and creating brand demand by brand advertising. The competition is not between distillers as such but between equivalent brand classes (*Industrial Pricing and Market Practices,* Alfred R. Oxenfeldt, "Whiskey Prices", p. 476; *The Whiskey Industry,* Harold L. Wattel[11] [1953 New School for Social Research doctoral thesis] Vol. II, p. 353).

From this concern in maintaining the prestige of its brands in its various brand classes the following truth concerning the industry has come about:

The distiller holds a firm grip on wholesaler to retailer prices. It does so through its methods of merchandising in the States where there are wholesalers, *i.e.*, the "open" or "license" States.[12] Distillers sell in these States through

[11] Author of Study Paper No. 5 for the Moreland Commission, cited *supra.*

[12] The Monopoly States are considered in the next topic of this brief.

a limited number of wholesalers. The largest national distillers, such as Seagrams, have but 330 wholesalers (Lind Affidavit, R. p. 193); National Distillers have 230 (Hermann Affidavit, R. p. 225); Hiram Walker has 105 (Revit Affidavit, R. p. 205). In a State with as large a volume of liquor sales as New York (12% of the nation's total [Br., p. 14]), Brown Forman sells to but 9 wholesalers (Street Affidavit, R. p. 217).

The distillers know precisely the percentage of business each of their wholesalers does in their product (Lind Affidavit for Plaintiffs, R. pp. 193-4, itemizing the percentage of business in Seagram's brands done by each of its 330 wholesalers).[13]

Distillers usually restrict their wholesalers in that they may not sell other distillers' brands in the same price class. (*Industrial Pricing and Market Practices,* Alfred R. Oxenfeldt, "Whiskey Prices", p. 477; *The Distilled Spirits Industry: A Marketing Survey,* Borregard & Glusker, Yale Law School [1950], pp. 88, 91.) With exceptions, wholesalers will do the substantial part of their business in a particular brand or in the brands of one distiller, either by virtue of an exclusive franchise, by contract so specifying, or by the fact of having the distributorship in an area (see as to New York, *infra,* Point II, B).

Thus the merchandising practices and pricing by its wholesalers are guided by the distiller (Borregard & Glus-

[13] The affidavit recites (pp. 193-4):

16 of their wholesalers do 75% or more of their business in Seagram brands.

61 of their wholesalers do approximately 60-75% of their business in Seagram brands.

73 do 40-60% of their business in Seagram brands.

79 do 20-40% of their business in Seagram brands.

64 do 5-20% of their business in Seagram brands.

37 do 1-5% of their business in Seagram brands.

ker, *The Distilled Spirits Industry, supra,* pp. 92-93, 96, 99, 133-134; Oxenfeldt, *Industrial Pricing and Market Practices,* "Whiskey Prices", pp. 477, 483; Wattel, *The Whiskey Industry,* Vol. II, pp. 388, 434). Indeed, wholesale prices have, bluntly, been said to be "dictated" by the distiller (Borregard & Glusker, *The Distilled Spirits Industry,* p. 87), who sets the price structure at all levels of the industry (Wattel, *The Whiskey Industry,* Vol. II, p. 388).

The wholesaler's continuing in business depends on his having the brand products to sell. Departure from distiller "suggested" prices, from the mark-up spelled out to it by the distiller, means loss of the franchise or of the distribution of the distiller's brand or brands. Loss of one distiller's brand or brands for cause makes it unlikely that the wholesaler would get the distributorship of another major distillery. Distillers may be competitors, but the maverick wholesaler as to one distiller would be suspect by the others (Studies, *supra*).

The liquor wholesaler may be independent as a business entity (which appellants assert, Br. pp. 13-14, 62). But independent of the distiller whose brand is the mainstay of its business, it is not. Neither as to pricing nor as to merchandising practices.

While the wholesaler is therefore not independent on pricing, his consolation is large volume sales, because the number of wholesalers for a brand is few and the proportion of retailers to wholesalers is large.

As to control over merchandising practices, the distillers' is impressive. Structurally the big four distillers which set the pattern for the operations of the others, the distillers which operate nationwide and therefore would

have operations in other States to consider in making affirmations under § 9, are highly organized (Lind Deposition in *Laird* v. *Gage* [Kansas District Court, 1964[14]]): They have within themselves a federation, so to speak, of geographic regions: Eastern, Southern, Western, etc. Each is under the responsibility of a company vice president. Each region is then constituted of divisions which include several States. A company officer is in charge of each division. Each State in which the company operates is under the supervision of a company executive, and so on. They have field supervisors and representatives. The reporting is from the lowest unit at the bottom on up through State directors, division directors, regional directors, to the top (*e.g.* Hermann Affidavit, R. p. 226).

The companies necessarily have massive marketing staffs which fan across the country wherever their brands are sold. They have field representatives, known colloquially in the industry as "missionaries", who watch over the merchandising of their brands and their prices. (Lind Deposition in *Laird* v. *Gage, supra;* Oxenfeldt, *Industrial Pricing and Market Practices,* "Whiskey Prices", p. 477; Borrerard & Glusker, *The Distilled Spirits Industry: A Marketing Survey,* P. 75.)

We have seen from Mr. Lind's affidavit that each and every one of Seagram's wholesalers was willing to disclose —if Seagram did not already know—precisely how much of the wholesaler's total business was in Seagram products. (That is, the total of the wholesaler's business, including that which he did in the products of other distillers.) When a distiller has been able to obtain this infor-

[14] This is the case involving the validity of a Kansas statute having the same purpose as the New York statute here involved, but totally different in provision, which was held unconstitutional (Br., p. 49. It is presently on appeal to the Supreme Court of Kansas).

mation even from wholesalers who do only 1%-5% of their business in the distiller's brand (*supra*, p. 28), would one not be obliged to eye quizzically and with considerable skepticism appellants' argument (Br. pp. 62-63) that even related wholesalers will not tell the brand owner what they charge for the brand owner's *own* product?

Sale of Distilled Spirits to "Monopoly" or "Control" States.

In addition to the sale of liquor by wholesalers in States commonly termed "open" or "license" States to whom distillers sell their brands, which has been discussed above, liquor is also sold in the United States by the States themselves. Such States are referred to as "monopoly" or "control" States.

There are 17 such States where liquor is sold by the State and not by private enterprise. In 16 of these it is sold by the State at wholesale and retail level for off-premises consumption; in the 17th (Wyoming) on the wholesale level only. In all 17 States thus the distiller sells to the State directly without intervening wholesaler.

In selling to all of these States the distiller must warrant that the distiller's price to the control State is no higher than the lowest price in any other State at the instant of sale (see Street Affidavit on behalf of Plaintiffs, R. p. 220). In at least some of these States, *e.g.*, Pennsylvania, such charge must reflect the cash or commodity allowances, post-offs or discounts offered purchasers in any other State (Phillips' Affidavit for Defendants, R. p. 313). Opinion of Court of Appeals, 16 N. Y. 2d at p. 57.

Summary of Argument

Plaintiffs' arguments are built on a platform which they first construct, not of any actualities nor of the statutory provisions they are attacking, but of conjecture, of speculation, of *their* opinion—which they stoutly assert as fact—of what the statute does and is, or does not do or is not. For example, Point heading I (Br. p. 25): the statute "levies an economic burden on the operations of the distilled spirits industry in other States". Or, another example (in connection with their supremacy argument): "even assuming the Act to be otherwise in furtherance of the State's police power which is not the case here" (Br. p. 43). Their arguments of constitutional violations must needs fall resting as they do on such groundless assumptions.

Appellants' arguments of the effect of the statute upon their profits and of the problems of compliance—conjectural and speculative and demonstrated to be hollow by distribution and pricing practices of the Industry generally and in New York State—have no bearing on the constitutionality of the statute; would have no bearing even if compliance would confront appellants with great difficulty and expense.

Section 9 is an internal regulation of the sale of liquor within the borders of the State and is, as is the State's entire Alcoholic Beverage Control Law, and as are the liquor laws of all the States (including the "monopoly" or "control" States) constitutionally within the State's power under the Twenty-first Amendment.

Moreover this is an enactment under the Police Power. Control of maximum prices of commodities and services is a proper exercise of the Police Power.

Were the subject of § 9 a product other than liquor (and thus the Twenty-first Amendment not determinative) and did the existence of the law have any repercussions in other States, this would not constitute interference with Interstate Commerce.

The Sherman Act and Robinson-Patman Act are also irrelative to § 9. The remedial objectives of the former are totally different from the remedial objective of § 9 and there is no issue of conflict or harmony between the federal acts and § 9, and no issue of supremacy. This would be so were the subject of § 9 a product other than liquor and thus the Twenty-first amendment not determinative.

POINT I

Section 9 is an internal regulation of the sale of liquor within the borders of New York State by those licensed by the State to traffic in liquor within the State. It thus is an enactment constitutionally within the State's power under the Twenty-first Amendment of the United States Constitution, as is the State's entire Alcoholic Beverage Control law and as are the laws of all states controlling traffic in liquor therein.

Every State in the United States has its own statute in respect to the sale of liquor therein. Regulation in each State is according to its own lights of what is in the public

interest of its people. Some States, after Repeal, continued to prohibit the sale of liquor. At least one still does. Seventeen States have prohibited private enterprise engaging at all in the sale of liquor, making such sale a State function.[15] These are the "monopoly" or "control" States. Distillers and manufacturers sell to these States on State terms. In all of the other States the sale is by private enterprise under State license, on conditions required to be met to qualify for State license and to retain such license.

Regulation is detailed and affects all aspects of operation in the license States. An aspect of such regulation in many States affects pricing, minimum and maximum as well. A price warranty, with the same purpose as our § 9, is a condition of distillers' selling to "monopoly" or "control" States (*supra*, p. 31).

Soon after Repeal various aspects of State regulation were challenged in the Courts. All were upheld by this Court. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138 (1939); *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U. S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1939); *State Board of Equalization* v. *Young's Market*, 299 U. S. 59; *Carter* v. *Virginia*, 321 U. S. 131 (1944).

An effort, some years after this group of cases, was made by the *State of California* to file a bill of complaint in this Court against the *State of Washington*, contending that Washington had erected trade barriers to sale of California wine within the State, thus violating the Commerce Clause, a violation which California contended was not sanctioned by the Twenty-first Amendment.

This Court's *Per Curiam* opinion in that case (358 U. S. 64 [1958]) disposed of the matter summarily, saying:

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[15] One of these, Wyoming, licenses private retailers, *supra* p. 31.

"The motion for leave to file bill of complaint is denied. U. S. Const., Amend. XXI, § 2; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395; *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401; *State Board of California* v. *Young's Market Co.*, 299 U. S. 59."

Just as does *California* v. *Washington* (*supra*), so do all of the above cited cases deny appellants' essential position that State liquor legislation must affirmatively promote temperance to come within the Twenty-first Amendment:

In *State Board* v. *Young Market Co., supra,* the California statute which exacted a $500. annual license fee for the privilege of importing beer from other States, obviously designed to protect local from foreign beer, was upheld.

In *Mahoney* v. *Joseph Triner Corp., supra,* a Minnesota statute imposing requirements as to liquor imported from other States not imposed on liquor processed within the State, was sustained, the Court noting that the statute "clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere." (304 U. S. at 403.)

Held valid in *Indianapolis Brewing Co.* v. *Liquor Control Commission, supra,* and *Joseph S. Finch & Co.* v. *McKittrick, supra,* were retaliatory laws enacted by Michigan and Missouri respectively, which prohibited the importation or sale of beer manufactured in a State discriminating against beer produced in Michigan (*Indianapolis Brewing Co.* case) or Missouri (*Finch* case). In the *Indianapolis Brewing* case, the contention that the Michigan statute violated the due process clause was rejected. (305 U. S. at 304.)